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Before the
Federal Communications Commission
Washington, D.C.

In the Matter of:

Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

To the Commission:

JOINT PETITION FOR RECONSIDERATION

Multivision Cable TV Corp. and Providence Journal Company[1] (hereinafter "Joint Petitioners"), by their attorneys, hereby submit their Joint Petition for Reconsideration, pursuant to Section 1.429 of the Rules, of the Commission's Report and Order in this proceeding.[2] Each of the Joint Petitioners owns and operates cable television systems and accordingly, will be directly affected by the outcome of this proceeding. The Report and Order adopts rules which implement the anti-trafficking, transfer and cross-ownership provisions of the 1992 Cable Act. Many of the provisions of the Act are relatively well-defined and precisely spelled out and the Commission's implementation of

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[1] Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

[2] Report and Order and Further Notice of Proposed Rule Making, MM Docket No. 92-264, FCC 93-332 (July 23, 1993) (hereinafter "Report and Order").

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those provisions is unobjectionable. With respect to certain issues, however, the Joint Petitioners respectfully submit that the regulatory actions taken by the Commission are in excess of its statutory authority and are arbitrary and capricious. Others simply require modification or clarification to make them more workable. Accordingly, Joint Petitioners urge the Commission to reconsider and revise its decision as set forth below.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO PROHIBIT THE ACQUISITION AND INTEGRATION OF SMATV FACILITIES BY CABLE OPERATORS

Section 613(a)(2) of the 1992 Act enlarged existing cross-ownership restrictions to provide that:

> It shall be unlawful for a cable operator . . . to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchised area served by that cable operator's cable system.[3]

In interpreting the "separate and apart" language of the statute the Commission concluded that it was intended to permit cable operators to construct either stand-alone or integrated SMATV facilities within their cable service area as long as they were operated in accordance with all terms and conditions of the cable franchise. Report and Order at ¶ 122. However, the Commission also concluded that cable operators should be barred from acquiring in-market SMATV

[3] 47 U.S.C. § 533(a)(2).

facilities, whether or not they are subsequently integrated into the cable system operation. Id. at ¶ 123.

Joint Petitioners respectfully submit that in reaching these conclusions, the Commission has erred in two important respects: (1) that a cable operator may not acquire existing SMATV facilities and (2) that SMATV systems which are integrated into the cable system must be operated in accordance with the terms and conditions of the cable franchise.

A. Acquisition of SMATV Facilities Is Not Addressed In Or Prohibited By The Cable Act

Preliminarily, it is important to point out that the Commission's NPRM in this proceeding did not address a possible distinction between acquisition and construction of SMATV facilities by cable operators; accordingly, interested parties had no notice or opportunity to comment on this issue. Moreover, it does not appear that any commenting party took the position that cable operators should not be allowed to acquire, as opposed to construct, SMATV facilities. As indicated in the Commission's discussion of this issue, various commenters simply argued that the "separate and apart" provision of the statue would be met if the acquiring party either integrated the SMATV facility into the cable system or operated it in accordance with the franchise. Report and Order at ¶ 125.

The Commission has pointed to no statutory authority for its conclusion and prohibition other than general references to the objectives of media diversity and prevention of anti-competitive conduct. Report and Order at ¶ 121. Nothing in the references to the Senate Report cited by the Commission, or elsewhere in the legislative history of the Act for that matter, reflects an intent by Congress, express or implied, to restrict the ability of cable operators to acquire SMATV systems. It is noteworthy, however, that when Congress intended to enlarge governmental control over the acquisition of media competitors in the same market, it did so quite explicitly and precisely. Thus, for example, Section 613(d) of the Act was amended to specifically empower franchise authorities to deny cable system transfers where the acquisition would reduce or eliminate competition in the provision of cable service. No comparable grant of authority was given to the FCC with regard to cable system acquisition of SMATV facilities.

B. The Cable Act Does Not Require A SMATV Facility Which Is Integrated Into The Cable System To Be Operated In Accordance With The Cable Franchise

The Joint Petitioners submit that the Commission likewise erred in its conclusion that stand-alone or integrated SMATV systems must be operated in accordance with the terms and conditions of the cable television franchise. A SMATV facility that only serves subscribers in one or more multiple dwelling units under common ownership, control or management and which does not use public rights of way is specifically excluded from the definition of a cable system.[4] Thus, such a facility would not be subject to the franchise requirement of Section 621(b) of the Act, 47 U.S.C. § 541(b), and the Act gives the Commission no authority to force such a result, whether the SMATV system is owned by a cable operator or not.[5]

Neither is there a persuasive public policy reason for subjecting these operations to the franchise terms. First, the plant does not use public rights of way, so the local government has no jurisdiction from that standpoint. Second, the entity in control of the development (landlord, developer, condominium board or homeowners' association) has bargaining power equivalent to that of the cable operator and does not need the "protection" of the local government that individual subscribers may need. The terms of the service agreement for the development are the result of arms length negotiations.

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[4] Section 602(7) of the Act; 47 U.S.C. § 522(7). See FCC v. Beach Communications, Inc., 113 S.Ct. 2096 (1993).

[5] Moreover, the courts have ruled that local authorities may not assert cable franchise jurisdiction over SMATV systems. See, e.g. Satellite TV of New York v. New York Cable Comm'n, 579 F.Supp. 1546 (S.D.N.Y. 1984); see also Earth Satellite Communications, 95 F.C.C.2d 1223 (1983), aff'd, New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984) (affirming FCC preemption of state SMATV regulation).

Further, such an entity is in a better position than the local government to determine specific characteristics and community interests of the development that may not exist in the community at large. For one thing, the economics of providing service are totally different because in bulk-billing situations typical of SMATV service, rates typically are based on 100% penetration in the service area, much higher density than in the community at large and use of private rather than public rights of way. Thus, it would be inappropriate to impose another level of inapplicable regulatory requirements on service. In addition, the design of the cable plant and the programming offered may be customized for the residents of the development. For example, there may be a special information channel inserted for development residents and channels may be packaged in a different way. Invariably, franchise requirements will conflict with the terms and conditions of these private contracts. Applying franchise requirements to these contracts will only create confusion and legal ambiguity and will deny residents of amenities and benefits they would otherwise be able to enjoy.

In summary, Joint Petitioners submit that the Commission has taken a strained and incorrect construction of the "separate and apart" provision of the Act. The straightforward, and correct, reading of the plain language is that cable operators may, so long as the facility is integrated into the cable system, construct or acquire a SMATV facility in the franchise area without regard to applicable cable franchise requirements.

II. CERTAIN ASPECTS OF THE COMMISSION'S ANTI-TRAFFICKING AND TRANSFERS RULES REQUIRE RECONSIDERATION OR CLARIFICATION

A. Certification Of Compliance

The Report and Order concludes that parties assigning or transferring control of a cable system must certify to the franchise authority that the transaction complies with the requirements of the three-year holding period regardless of whether the franchise requires local approval of the transfer. Petitioners strongly urge that such certification, in all instances, need only be made to the Commission. To do otherwise simply interjects a federal issue into the local process and invites further delays and inconsistent rulings and results; it is critical for the Commission to promote uniformity and consistency in this area so that not only buyers and sellers but also investors and lenders will be afforded predictability and certainty.

At a minimum, the Commission should modify its rule to provide that in the event the franchise does not require local consent to the transfer, the required certification need only be made to the Commission. Formal certification to local authorities in this instance would simply create the opportunity for scrutiny and delay of a proposed transaction which is otherwise outside local jurisdiction, with regard to a federal statutory and regulatory issue. No useful public policy purpose is served by this unnecessary and potentially disruptive involvement by local authorities. The Commission has cautioned that franchise authorities may not attempt to use the transfer process to circumvent federal regulatory authority over matters not within local control[6]; to require local certification where no local consent is needed is simply an invitation to such abuse.

B. Exempt Transactions

As the Commission observes, the statute expressly exempts and excepts certain types of transactions from the three-year holding period requirement - "tax free" transactions, transfers by operation of law, transfers to affiliates and multiple or step transactions. However, the Commission's discussion of these exceptions and exemptions, while indicating that they are outside of the anti-trafficking provision, does not expressly state that no certification to that effect is required to be made to local authorities. The Petitioners understand that to be the Commission's intent, inasmuch as the FCC Form 394 only requires the applicant to certify as to the date on which the system was acquired or on which service was provided to the

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[6] Report and Order, ¶ 39 n.38.

first subscriber by the transferor/assignor.[7] In an abundance of caution, Joint Petitioners ask the Commission to confirm that transactions which fall within one of the exceptions to the anti-trafficking rule do not require certification of compliance to local authorities; this clarification will avoid any possible future misunderstandings and disputes.

C. Transferee's Future Plans For The Operation Of The System

The Commission's discussion of the transfer process and the thrust of the questions covered by FCC Form 394 clearly, and properly, focus on the legal, technical and financial qualifications of the proposed new owner or controlling party of the system. Among the various questions which are directed to those issues, however, is an item which requires the applicant to describe and certify to "any plans to change the current terms and conditions of service and operations of the system."[8] While the local franchise transfer process may often involve discussions as to the future operation of the system, the inclusion of that item in an FCC mandated form, subject to the penalties of 18 U.S.C. § 1001, places the applicant in a difficult, if not impossible, dilemma and is entirely inappropriate, given that proper focus of the transfer process should be limited to the new owner's

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[7] FCC Form 394, Section I Question 5.

[8] FCC Form 394, Section I Part II Question 2.

qualifications. If the applicant in good faith indicates that it has no present intention to make changes and then subsequently adds new services, engages in a rebuild, recalculates its rates or in any way changes the status quo, the franchise authority could claim a violation of a condition of its consent. Conversely, if the applicant describes various possible plans for changes, the franchise authority may attempt to negotiate or limit those plans, even in areas where it has no power to do so. As previously noted, the Commission has instructed franchise authorities that they may not use the transfer process to accomplish indirectly what they are forbidden to do directly.[9] The inclusion of this question on the transfer form is simply an invitation to do so and Joint Petitioners strongly recommend its removal.

III. CONCLUSION

Joint Petitioners concur that with respect to most aspects of the rules adopted in this proceeding, the Commission has properly and appropriately implemented the applicable provisions of the Act. The modifications and

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[9] See also Group W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954 (N.D. Cal. 1987) (limiting the power of the franchising authority to demand disclosure by a potential cable operator).

clarifications proposed herein will address any remaining defects and the Joint Petitioners urge their adoption.

Respectfully submitted,

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September 7, 1993